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No. 00-948

IN THE

Supreme Court of the United States

UNITED AIRLINES, INC.,
Petitioner,

v.

LESLIE FRANK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of Petitioner in this case. The written consent of Petitioner United Airlines, Inc. has been filed with the Clerk of the Court. Counsel for Respondents Leslie Frank, Pat Parnell, Susan Broderick, Carole Kirk, Nichkol Melanson, Sandra Huff, Diane Davis, Sharon Benjamin, Sharron K. Taylor, Bland Lane, Joan Balla Weaver, Donna Dirkin, and Ellen McCormick has refused consent.

In support of its motion, EEAC by the following shows that this brief brings relevant matters to the attention of the

Court that have not already been brought to its attention by the parties:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations.

2. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

3. All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, as well as other equal employment statutes and regulations.

4. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding whether, as the court below ruled, the "disparate impact" theory of discrimination is available under the ADEA.

5. The lack of consistency in the courts regarding whether disparate impact claims of discrimination may be brought under the ADEA, and if so under what circumstances, creates substantial uncertainty in an area of law that is of great importance to the business community. As a direct consequence of the circuit court divide on this issue, many employers are constrained in their ability not only to conduct business in a uniform

manner, but also to monitor their business practices for EEO compliance.

6. EEAC's member companies, most of which conduct business in all or most of the federal judicial circuits, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws.

7. As part of that commitment, these companies seek to develop and implement nondiscriminatory personnel policies and practices at each of their business sites, irrespective of location. This effort is undermined where there is inconsistency and instability in the applicable law, as is presently the case on the fundamental issue of disparate impact under the ADEA. The Ninth Circuit's ruling below only adds to the conflict in this area of the law.

8. Because of this interest, EEAC has filed *amicus curiae* briefs in cases addressing this issue in several circuit courts of appeals. It also has participated in a number of other cases before this Court in which important public policy issues involving the ADEA were presented.

9. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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February 2, 2001

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*, contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

340 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding whether, as the court below ruled, the "disparate impact" theory of discrimination is available under the ADEA.

Because of this interest, EEAC has filed *amicus curiae* briefs in cases addressing this issue in several circuit courts of appeals. *E.g.*, *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999); *Hiatt v. Union Pac. R.R.*, 65 F.3d 838 (10th Cir. 1995); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984). EEAC also has participated in a number of other cases before this Court in which important public policy issues involving the ADEA were presented. *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158 (1989); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977).

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The respondents are current and former employees of the petitioner, United Airlines ("United"). From 1980 to 1994, United maintained an employment policy under which flight attendants were required to comply with maximum body weight limitations. Flight attendants who exceeded the maximum weight requirements were subject to discipline, up to and including termination.

Respondents filed a class action lawsuit claiming, *inter alia*, that United's weight restriction policy had a disproportionately adverse impact on older workers in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The United States District Court for the Northern District of California properly dismissed respondents' disparate impact claims, determining that such actions are not cognizable under the ADEA.

Relying on an earlier Ninth Circuit decision in *Arnett v. California Pub. Employees Ret. Sys.*, 179 F.3d 690, 696-97 (9th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000), a divided Ninth Circuit panel reversed and remanded the District Court's decision, ruling that claims asserting a disparate impact theory of discrimination may be brought under the ADEA. United has now petitioned this Court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve a fundamental question of employment law on which federal circuit courts are deeply divided, that is, whether the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, provides a cause of action under a "disparate impact" theory of employment discrimination. Relying on this Court's rationale in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), the First, Seventh and Tenth Circuit Courts of Appeals have ruled

that it does not.[2] *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999), *cert. denied*, 528 U.S. 811 (1999); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996). In contrast, the Second and Eighth Circuits, like the court below, have allowed such actions to proceed. *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347 (2d Cir. 1997); *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996).

Given the conflicting decisions of the federal appellate courts, the matter of whether or not disparate impact claims are available under the ADEA is ripe for resolution by this Court.

The lack of consistency in the courts regarding whether disparate impact claims of discrimination may be brought under the ADEA, and if so under what circumstances, creates substantial uncertainty in an area of law that is of great importance to the business community. As a direct consequence of the circuit court divide on this issue, many employers are constrained in their ability not only to conduct business in a uniform manner, but also to monitor their business practices for EEO compliance.

EEAC's member companies, most of which conduct business in all or most of the federal judicial circuits, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. As part of that commitment, these companies seek to develop and implement nondiscriminatory personnel policies and practices at each of their business sites, irrespective of

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[2] Additionally, although they have not squarely decided the issue, the Third and Sixth Circuits have expressed skepticism over the viability of disparate impact claims under the ADEA. *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998).

location. This effort is undermined where there is inconsistency and instability in the applicable law, as is presently the case on the fundamental issue of disparate impact under the ADEA. The Ninth Circuit's ruling below only adds to the conflict in this area of the law.

Moreover, the decision below is inconsistent, and arguably conflicts, with this Court's decisions in *Hazen Paper* and *Gunther*, which both support the principle that disparate impact actions are not available under the ADEA. *Hazen Paper v. Biggins*, 507 U.S. 604 (1993); *County of Washington v. Gunther*, 452 U.S. 161 (1981). Specifically, while it did not squarely resolve the issue, *Hazen Paper* raises serious doubt about the viability of disparate impact claims under the ADEA. So too does this Court's ruling in *Gunther* that the disparate impact theory of discrimination is unavailable under the Equal Pay Act, 29 U.S.C. § 206(d), where the conduct complained of is based on a factor "other than sex." 452 U.S. at 170-71. Given that the EPA's "factor[] other than sex" and the ADEA's "reasonable factor other than age" defenses are virtually identical, this Court's rationale in *Gunther* should apply to preclude disparate impact claims brought under the ADEA.

For the foregoing reasons, this Court should grant the petition and reverse the Ninth Circuit's decision below.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT DISPARATE IMPACT CLAIMS OF DISCRIMINATION ARE AVAILABLE UNDER THE ADEA DIRECTLY CONFLICTS WITH DECISIONS OF THE FIRST, SEVENTH, AND TENTH CIRCUIT COURTS OF APPEALS ON AN ISSUE OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYMENT COMMUNITY

A. The First, Seventh and Tenth Circuits Hold That Disparate Impact Claims Are Not Cognizable Under the ADEA

Relying on this Court's rationale in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), the U.S. Courts of Appeals for the First, Seventh, and Tenth Circuits unequivocally have ruled that disparate impact discrimination claims are not cognizable under the ADEA. *Mullin v. Raytheon Co.*, 164 F.3d 696, 699-704 (1st Cir. 1999); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-78 (7th Cir. 1998); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-10 (10th Cir. 1996). While this Court acknowledged in *Hazen Paper* that it has yet to resolve this issue squarely, 507 U.S. at 604, the analysis strongly suggests that actions brought under the ADEA are limited to those involving disparate treatment. *See, e.g., Ellis*, 73 F.3d at 1009 ("one cannot read [*Hazen Paper*] without receiving the strong impression that the Supreme Court is suggesting that the ADEA does not encompass a disparate impact claim")(footnote omitted).

Additionally, while declining to reach the issue on its merits, the Third and Sixth Circuits have expressed doubt, in the wake of *Hazen Paper*, over the viability of disparate impact discrimination claims under the ADEA. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995) ("[I]n the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under

the ADEA."); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998) ("[T]here is now 'considerable doubt as to whether a claim of age discrimination may exist under a disparate impact theory.'")(quoting *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995)).

B. The Second, Eighth, and Ninth Circuits Have Ruled that Disparate Impact Claims Are Available Under the ADEA

In direct conflict with the First, Seventh and Tenth Circuits, the Second, Eighth, and Ninth Circuits continue to rely on pre-*Hazen* precedent to allow disparate impact causes of action under the ADEA. *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir. 1997); *Arnett v. California Pub. Employees Ret. Sys.*, 179 F.3d 690, 696-97 (9th Cir. 1999), *vacated and remanded on other grounds*, 528 U.S. 1111 (2000).

Unlike the Ninth, however, the Second and Eighth Circuits have limited the circumstances under which such an action may proceed. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999). In particular, neither circuit will allow a disparate impact action under the ADEA where the complained-of policy or practice disproportionately disadvantages only a sub-group of persons within the protected class. *Id.* Thus, if a challenged company policy is alleged to have a disparate impact only on workers who are 50-plus years old and not the entire class of individuals age 40 or more, the Second and Eighth Circuits have ruled that such a claim is outside the scope of ADEA coverage. *Id.*

In *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999), the Eighth Circuit reasoned:

> [I]f disparate-impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer engaging in an RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force. Adoption of such a theory, moreover, might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes. . . We have held that employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination. We certainly do not think that Congress intended to impose liability on employers who rely on such criteria just because their use had a disparate impact on a subgroup.

McDonnell Douglas at 951 (citations omitted).

The Eighth Circuit's rationale in *McDonnell Douglas* begs the broader question: at what point does an employer's reliance on factors other than age rise to the level of impermissible disparate impact discrimination under the ADEA? In the absence of a definitive ruling from this Court that disparate impact is not cognizable under the ADEA, the answer to that question will continue to vary from court to court, at least within the jurisdictions that now recognize disparate impact claims under the ADEA.

The Second and Eighth Circuits' partial application of the disparate impact theory of discrimination to ADEA cases essentially creates a split-within-splits of opinion as to whether such claims are viable, and only adds to the confusion and unpredictability of the law in this area.

C. The Inconsistency Among Courts on the Issue of Whether Disparate Impact Discrimination Claims Are Available Under the ADEA Substantially Undermines Employers' Efforts To Develop and Enforce EEO-Compliant Business Practices

The lack of consistency in the courts regarding whether, and under what circumstances, disparate impact claims of discrimination may be brought under the ADEA creates substantial uncertainty in an area of law that is of great importance to the business community. EEAC member companies, most of which conduct business in multiple circuits, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws.

As part of that commitment, these companies seek to develop and implement nondiscriminatory personnel policies and procedures at each of their business sites, irrespective of location. This effort is undermined when there is inconsistency and instability in the laws that apply to various locations, as is presently the case on the issue of disparate impact under the ADEA. As a consequence, many employers are constrained in their ability not only to apply internal policies in a uniform manner, but also to self-monitor for EEO compliance.

Unlike race or sex, which are immutable characteristics, age is a progressive condition that affects all individuals. Most if not all workers eventually will attain the age of 40, joining the class of individuals protected under the ADEA, and continue to age for no reason other than the passage of time. Prudent employers typically monitor the impact of their selection practices on minorities and women as an early warning device to avoid potential liability under Title VII. For employers doing business in those circuits that recognize a disparate impact cause of action under the ADEA, prudence

would seem to dictate that they do the same for age. In practice, however, achieving statistical parity by age is an impossible task, since it is constantly changing and never static from one day to the next.

Moreover, while any employer's workforce can be divided neatly into two groups—those within the ADEA's protected class and those who aspire to be—conducting a statistical analysis to identify adverse impact is not so simple. Under this Court's decision in *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308 (1996), the comparator for the purposes of assessing potential age discrimination need not be outside the protected class, *i.e.*, under 40. Accordingly, to monitor fully every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age. Since a meaningful statistical comparison requires a sufficient sample size, this calculation would actually degenerate to a mere cohort analysis—in other words, a disparate treatment analysis. As the Second and Eighth Circuits have concluded, comparing age sub-groups simply does not work.

Also unlike other protected characteristics, age often is correlated to legitimate criteria such as seniority, salary and the like, which routinely are used by employers as means of differentiating employees. Because of the progressive nature of age, these facially neutral policies necessarily will have a different impact on different individuals depending on their age at the time the business decision is made. *Ellis*, 73 F.3d at 1009; *see also* Note, *Mullin v. Raytheon Company: The Threatened Vitality of the Disparate Impact Theory Under the ADEA*, 52 Me. L. Rev. 149, 171 (2000).

In the jurisdictions that now recognize disparate impact claims under the ADEA, employers may be severely hampered, for instance, in their ability to manage business downturns through the use of layoffs or reductions in force.

In jurisdictions where such a cause of action is not allowed, however, those same businesses are free to make reasonable decisions that are critical to sustained business success, even if the decisions are based on factors indirectly related to age.

Because of the increasingly conflicting rules of law among the jurisdictions in which they conduct business, EEAC member companies have a unique interest in having the matter finally adjudicated and resolved by this Court.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT, AND ARGUABLY CONFLICTS, WITH THIS COURT'S PRIOR RULINGS IN *HAZEN PAPER* AND *COUNTY OF WASHINGTON v. GUNTHER*

A. *Hazen Paper* Raises More Than a Specter of Doubt About the Availability of Such Claims

In *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), this Court ruled that legitimate business decisions only indirectly correlated with age do not violate the ADEA under a disparate treatment theory of discrimination. Noting that "[t]he disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear," the Court determined that an employer cannot be liable under that theory if its conduct was motivated by a factor other than age. *Hazen Paper*, 507 U.S. at 609.

The Court explained:

> Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA. . . . Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes. . . . When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if

> the motivating factor is correlated with age, as pension status typically is.

Id. The Court also noted, "[b]y contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA and we need not do so here." *Id.* (citation omitted). Taken together, this language strongly suggests that a disparate impact claim based on a criterion other than age likewise would not be viable under the ADEA.

Indeed, in his concurring opinion, Justice Kennedy cautioned:

> [N]othing in this Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII. . . . [W]e have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.

Hazen Paper, 507 U.S. at 618 (citations omitted). Thus, while this Court in *Hazen Paper* did not squarely resolve the issue, Justice O'Connor, writing for a unanimous Court, and Justice Kennedy in his concurring opinion, raise serious doubt about the viability of disparate impact claims under the ADEA.

As noted above, a number of courts have relied on *Hazen Paper* to reach the logical conclusion that while disparate treatment claims are available under the ADEA, disparate impact claims are not. To the extent that the Ninth Circuit chose to ignore this Court's pronouncements in *Hazen Paper* and instead looked for guidance to its own prior decisions, which rely on pre-*Hazen* precedent, its decision below is incorrect.

B. This Court's Holding in *County of Washington v. Gunther* Stands for the Proposition That Disparate Impact Claims Are Not Allowed Where a Decision Based on Factors Other Than Protected Class Membership Is Expressly Permitted by Statute

The Ninth Circuit's decision below is inconsistent, at best, with this Court's holding in *County of Washington v. Gunther*, 452 U.S. 161 (1981), that the disparate impact theory of discrimination is unavailable under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), where the conduct complained of is based on a factor "other than sex." Contrasting the EPA with Title VII of the Civil Rights Act of 1964, the Court noted:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The structure of Title VII litigation . . . has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

Gunther at 169 (citations omitted)(footnote omitted). Thus, an employer that makes an employment decision based on some factor "other than sex" will not violate the EPA, even if that factor has a disproportionately adverse impact on women.

The ADEA contains an affirmative defense to liability that is strikingly similar to that found in the EPA. It provides, in relevant part:

> It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where . . . the differentiation is based on reasonable factors other than age. . . .

29 U.S.C. § 623(f)(1). Thus, like the EPA, the ADEA provides a specific statutory exception to liability for discrimination where the complained of conduct is based on "reasonable factors other than age." *Id.*

Accordingly, several courts have relied on *Gunther* as further support for disallowing disparate impact claims under the ADEA. *Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir. 1996). In *Mullin*, for instance, the First Circuit reasoned:

> When the ADEA's general prohibition and the statutory exception are read in *pari materia*, as a unified whole, the prohibition forbids disparate treatment based on age and the exception authorizes disparate impact. Thus, Professor Laycock's commentary, made in the Equal Pay Act context, applies equally to the ADEA: "The prohibition and the exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact."

164 F.3d at 702 (citations omitted). *Cf. Markham v. Geller*, 451 U.S. 945, 949 (1981) (Rehnquist, J., dissenting from denial of petition for writ of certiorari) (noting that the ADEA "provides that it shall not be unlawful for an employer to take any action otherwise prohibited 'where the differentiation is based on reasonable factors other than age'").

In view of the clear parallel between the EPA and the ADEA regarding exceptions to liability for conduct based on factors other than a protected characteristic, the decision below is inconsistent with this Court's ruling in *Gunther*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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